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ABSTRACT

This document presents the proceedings from a legislative hearing before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary, House of Representatives on S. 487, the Technology, Education, and Copyright Harmonization Act of 2001, popularly known as the TEACH Act. The TEACH Act amends sections 110(2) and 112 of the Copyright Act to facilitate the growth and development of digital distance education. It permits governmental bodies and nonprofit educational entities to engage in the same types of mediated instructional activities found in the traditional classroom via digital distance education, while at the same time, protecting the rights of their markets and potential infringement. An opening statement was given by the Honorable Howard Coble, a representative in Congress from North Carolina, and Chairman of the Subcommittee, followed by a prepared statement of the Honorable Howard L. Berman, a representative in Congress from California. Oral testimonies and prepared statements were given by three witnesses. Marybeth Peters, Register of Copyrights, was the first witness, and represented the views of the Copyright Office on the TEACH Act. In her statement, Marybeth Peters concluded: as a whole, the package is balanced; it will benefit education in the United States and will not unduly harm copyright owners; and the Copyright Office strongly supports the carefully negotiated compromise reflected in the TEACH Act as passed by the Senate. The second witness was Allan R. Adler, Vice President, Legal and Government Affairs, Association of American Publishers, Inc. (AAP). Allan Adler's statement concluded: from the AAP's perspective, the compromise substantially addresses the publishers' main concerns regarding the revised exemption's potential substitution for sales and exposure of copyrighted works to unauthorized online reproduction and distribution; and the AAP hopes the Subcommittee will heed their urging and suggestion to move the Senate passed version of the TEACH Act through the

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House process for passage without amendment. The final witness was John C. Vaughn, Executive Vice President, Association of American Universities. John Vaughn's statement concluded that the TEACH Act, as passed by the Senate, will help develop the full potential of online distance education while effectively protecting the interests of copyright owners. A period of questioning followed, with Zoe Lofgren, California, joining. (AEF)

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TECHNOLOGY, EDUCATION AND COPYRIGHT HARMONIZATION ACT OF 2001

ED 456 838

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

ON

S. 487

JUNE 27, 2001

Serial No. 14

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TECHNOLOGY, EDUCATION AND COPYRIGHT HARMONIZATION ACT OF 2001

WEDNESDAY, JUNE 27, 2001

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10 a.m., in Room 2141, Rayburn House Office Building, Hon. Howard Coble [Chairman of the Subcommittee] presiding.

Mr. COBLE. Good morning, ladies and gentlemen. The Subcommittee on Courts, the Internet, and Intellectual Property will come to order. Today we are conducting a legislative hearing on S. 487, the Technology, Education, and Copyright Harmonization Act of 2001, or popularly known as the TEACH Act. Now this piece of legislation, as you all know, has generated must interest on the Hill. I look forward to the hearing today. I just told Mr. Berman I have checked with our cloakroom and I am told that we will have a floor vote on or about 10:30. So we can get a good half hour in prior to that.

Distance education, a form of education where students are separated from the instructors by time and or space, is expanding rapidly on all levels of education and for all types of students. Advanced digital technology has created exciting possibilities in education and markets for online educational products. For example, students who are physically removed from an educational institution or not able to attend regular classes due to time constraints have the option to enroll in classes online.

Commensurate with the increased amount of distance education presented online is an essentially equal amount of copyrighted educational material vulnerable to digital infringement. Section 110 of the Copyright Act contains provisions outlining permissible uses of copyrighted material for educational purposes. However, these provisions were written over 20 years ago prior to the advent of digital technologies. The Act should be updated to ensure a proper balance between the rights of copyright owners and the ability of users to access information.

In furtherance of this point, Congress passed the Digital Millennium Copyright Act of 1998. One of its provisions required the U.S. Copyright Office to conduct a study on digital distance education and to issue its findings to Congress. Completed in May 1999, this report is a comprehensive evaluation of the major issues surrounding distance education. In the report, the Copyright Office made

several legislative recommendations to facilitate the growth of distance education while protecting copyright owners rights.

On June 26th, 1999, this Subcommittee held an oversight hearing on the report of the Copyright Office. The testimony received at the hearing revealed how far apart the copyright owner and educational communities were in their assessment of the need for legislation in this area. The copyright owners argued that there was no need for legislation because the licensing of materials to educational institutions was occurring and rapidly increasing. The educational community, on the other hand, argued that licensing was difficult and uncertain, and therefore a disincentive to engage in distance education.

On March 7th of this year, Senator Hatch, joined by Senator Leahy, introduced S. 487, legislation to implement many of the recommendations made by the Copyright Office in its report. In the wake of a March 13th hearing on the bill, Senators Hatch and Leahy asked the education and copyright owner communities to negotiate a compromise with assistance from the Copyright Office. The subsequently developed draft was reviewed by the Senate Judiciary Committee, which then adopted a substitute to the TEACH Act that reflects the compromise.

The TEACH Act amends sections 110(2) and 112 of the Copyright Act to facilitate the growth and development of digital distance education. It permits governmental bodies and nonprofit educational entities to engage in the same types of mediated instructional activities found in the traditional classroom via digital distance education, while at the same time, protecting the rights of copyright owners by limiting the exemption to prevent harm to their markets and potential infringement.

The TEACH Act is a well-balanced, widely-supported compromise. It will promote greater access to education in the United States, a goal that we all can support. While the TEACH Act is a good compromise, it is a delicate one. It is my preference to move S. 487 expeditiously and without amendment, if possible, through the Committee and to the House floor. And I apologize to you, Mr. Berman, and to the congregated group here for my rather verbose opening statement, but I think it requires some detail.

Mr. COBLE. I am now pleased to recognize the distinguished gentleman from California, the Ranking Member, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman. Thank you for conducting this hearing. And just some points I would like to make. The bill that on which we are holding this hearing represents an excellent compromise which was reached in the Senate, and I would like to hear from our witnesses today about various aspects of that bill.

Though this bill represents a compromise that probably does not fully satisfy any party, it is, nonetheless, a significant revision of copyright law. Under this bill, certain entities would, for the first time, and in admittedly circumscribed circumstances, be allowed to digitize and place online the copyrighted works of others. This right will apply specifically in those circumstances that the copyright owners have failed to make, or have affirmatively decided not to make, their works available in digital format.

Ask any copyright owner, and you will soon see that they do not consider such a restriction of their rights to be inconsequential.

Such a significant new restriction on the rights of copyright owners is justified because distance education is critically important as we look to maintain our economic and creative edge in the world. We need to reduce the digital divide and ensure that we infuse the workforce with talented, educated and innovative workers. With distance education, we can reach more students in terms of physical distance and in terms of when students can learn. We want to be able to educate both the rural farmer and the day care provider, the teenager working a day job while attending school and the 50-year-old looking to make a career switch.

Distance education helps level the playing field by bringing the tools of success to those who have the least access to resources. We must, nonetheless, be conscious of the intellectual property concerns which accompany widespread use of distance education. We must protect against downstream copying of copyrighted files. We must continue to incentivize innovation in the digital arena, including new kinds of textbooks and other digital materials which facilitate and enhance distance education.

We would not have this bill in front of us today if it were not for the willingness of the content community to work in good faith toward a bill that does not immediately, in economic terms, benefit them, but instead constitutes a restriction of their rights. The creators of intellectual property are legitimately concerned about losing income if there is downstream distribution of their works.

This bill benefits everyone, except perhaps directly at least in the immediate sense the content community. And so I applaud their willingness to hammer out a compromise all parties can support and stick to throughout the legislative process. The universities, likewise, deserve commendation for being reasonable throughout the process and supporting a bill that may not have all the elements they may have wanted at the outset.

I look forward to hearing today and in the future about the ways this exemption from copyright liability improves education at all levels. I appreciate that that bill is a result of much blood, sweat and tears, and I fully support the compromise and look forward to hearing the testimony of our witnesses today.

I yield back, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Berman.

[The prepared statement of Mr. Berman follows:]

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman,

Thank you for calling this hearing on S. 487, the "Technology, Education and Copyright Harmonization Act." This bill represents an excellent compromise reached in the Senate, and I'm anxious to hear from our witnesses today about the various aspects of the bill.

Though this bill represents a compromise that probably does not fully satisfy any party, it is nonetheless a significant revision of copyright law. Under this bill, certain entities would—for the first time and in admittedly circumscribed circumstances—would be allowed to digitize and place online the copyrighted works of others. This right will apply specifically in those circumstances that the copyright owners have failed to make, or have affirmatively decided not to make, their works available in digital format. Ask any copyright owner, and you will soon see that they do not consider such a restriction of their rights to be inconsequential

Such a significant new restriction on the rights of copyright owners is justified because distance education is critically important as we look to maintain our eco-

nomic and creative edge in the world. We need to reduce the digital divide and ensure that we infuse the workforce with talented, educated, innovative workers. With distance education, we can reach more students, in terms of physical distance and in terms of when students can learn, called "asynchronous" learning. We want to be able to educate both the rural farmer and the day-care provider, the teenager working a day job while attending school and the 50 year old looking to make a career switch. Distance education helps level the playing field by bringing the tools of success to those who have the least access to resources.

And yet we must be conscious of the intellectual property concerns which accompany widespread use of distance education. We must protect against down-stream copying of copyrighted files, and we must continue to incentivize innovation in the digital arena, including new kinds of textbooks and other digital materials which facilitate and enhance distance education.

We would not have this bill in front of us today if it were not for the willingness of the content community to work in good faith toward a bill that does not benefit them, but instead constitutes a restriction of their rights. The creators of intellectual property are legitimately concerned about losing income if there is down-stream distribution of their works. This bill benefits everyone except the content community, and I applaud their willingness to hammer out a compromise all parties can support and stick to that compromise throughout the legislative process.

The Universities likewise deserve commendation for being reasonable throughout the process and supporting a bill that may not have ALL the elements they might have wanted at the outset. I look forward to hearing today and in the future about the ways this exemption from copyright liability improves education at all levels.

Legislation works best when the interested parties can find a workable compromise. I appreciate that this bill is the result of much blood, sweat and tears, and I fully support the compromise. I look forward to hearing the testimony of our witnesses today.

I yield back the balance of my time.

Mr. COBLE. I want to reiterate what Mr. Berman said, and again, extend congratulatory remarks to all players at the table. Many of you were at the table, and this final product may be something about which none of you are ecstatically happy about, but at least you can live with it and I commend you for that. We are blessed this morning with a very fine panel.

Our first witness will be the Honorable Marybeth Peters our very able register of copyrights for the United States. She has also served as active general counsel at the Copyright Office, and chief of both the examining and information and reference divisions. Ms. Peters has served as a consultant on copyright law to the world intellectual property organization and authored the general guide to the Copyright Act of 1976.

Our next witness is Mr. Allan Robert Adler, who is Vice President for legal and governmental affairs in the Washington, D.C. Office of the Association of American Publishers, the National Trade Association, which represents our Nation's book and journal publishing industries.

From 1989 until joining AAP in 1996, Mr. Adler practiced law at the law firm of Cohn & Marks. Among other accomplishments, Mr. Adler's practice included work on Federal legislation and rulemaking affecting cable and broadcast television, electronic publishing, copyright and post secondary education and career training programs. Mr. Adler holds a BA in history from the State University of New York at Binghamton and a juris doctorate from the National Law Center of the George Washington University in Washington.

Our final witness today is Dr. John C. Vaughn, who was appointed executive Vice President of the Association of American Universities in October 1996. Dr. Vaughn has specific responsibil-

ity for association activities in the areas of intellectual property, information technology, research libraries and scholarly communication and international education. Dr. Vaughn was awarded his BA in psychology from the Eastern Washington State College in 1968, located, I think, in Cheney, Dr. Vaughn. And in 1977, he received a Ph.D. in experimental mental psychology from the university of Minnesota.

Good to have each of you with us. The reason I say that Dr. Vaughn, my staff accuses me of knowing every little town—not that Cheney is a little town—but every little town in America. I am a geographic nut. I thought it was in Cheney. And you are the Eagles? Is that the nickname the Eastern Washington Eagles?

Mr. VAUGHN. That is right. Just after I left it became a university.

Mr. COBLE. Good to have all of you with us. As you all know, Mr. Berman and I try to practice the 5-minute rule. If you can say to us in 5 minutes, it will be appreciated. And your warning will be when the red light illuminates in your eyes.

Mr. COBLE. Madam Register, it is good to have you back with us and you will lead off if you will.

STATEMENT OF HON. MARYBETH PETERS, REGISTER OF COPYRIGHTS, COPYRIGHT OFFICE OF THE UNITED STATES, LIBRARY OF CONGRESS

Ms. PETERS. Thank you, Mr. Coble. I am pleased to represent the Copyright Office's views on S. 487, the Technology, Education and Copyright Harmonization Act, known as the TEACH Act. First, I would like to express my thanks to you, Mr. Chairman, and to Mr. Berman, for holding this hearing. This important legislation extends the current distance education exemption to cover mediated instructional activities transmitted through digital networks. It does so by amending sections 110(2) and 112 of the Copyright Act.

As you know, S. 487 is based on the Office's report on copyright and digital distance education. Section 403 of the Digital Millennium Copyright directed the Office to consult with representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives, and to submit to Congress a report on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users.

We were tasked with a number of issues. One was to look at the need for new exemption, the categories of works that should be included in that exemption, if any, the appropriate quantitative limitations on portions of works that might be used, who should be eligible to take advantage of the exemption, who should be eligible to receive the materials that would be made available through the exemption, an issue about technical measures which should be mandated as a condition of eligibility, and also the issue of licensing, the availability of licensing.

Our inquiry was extensive. We went far beyond the original mandate in seeking out input from consumers as well as for-profit educational institutions. There was public comment. We held hearings in three cities: Washington, Los Angeles and Chicago. We con-

ducted research. We had many, many meetings with various experts in the field.

We also commissioned a study on the licensing of copyrighted material in digital distance education. The report, which was delivered to Congress on May 25th, 1999, contained a description of digital distance education as it existed at that point; the licensing of works for use in digital distance education; the technologies involved; an in-depth analysis of the current law as it applied to distance education; and a description of prior initiatives that had addressed the issues, as well as a summary of the views of interested parties. It also included our analysis and recommendations for legislative change.

Some of the most important recommendations were to amend section 110(2) to clarify that the term "transmissions" covered digital as well analog transmissions; to expand the coverage of rights in section 110(2) to the those that are technically necessary to allow the delivery of authorized performances and displays through digital technologies; to eliminate the requirement of a physical classroom, but limit exemption to students officially enrolled in a course; to emphasize the concept of mediated instruction to ensure that the exemption is limited to what is, as much as possible, the equivalent of a live classroom setting; to keep the exemption limited to nonprofit educational institutions, but consider adding an additional requirement to make sure that the use was legitimate, that additional requirement was accreditation; to expand the categories of works exempted from the performance rights, but with respect to the new classes, to limit the portions that could be used to reasonable and limited; to basically require the use of lawfully made copies; and to amend the law to provide for ephemeral copies; and finally, to make sure that there were a number of new safeguards to counteract the new risks that occur when works are transmitted in digital form. We made these recommendations despite the Office's fundamental principle that emerging markets should be permitted to develop with minimal government intervention.

As you noted, you held a hearing shortly after that report was released. The Senate held a hearing on March 13th on S. 487. In my Senate testimony, I noted that the language of S. 487 raised a few issues. Additionally as you will hear, educational institutions and copyright owners objected to some, maybe all, of the provisions and had questions about other certain other ones. None of the identified issues or questions was easy to resolve, and at that point, I thought the parties were far apart. In late April, as you noted after the Senate hearing, the Office was asked to facilitate discussions among the interested parties with the goal of reaching consensus, and we were pleased to do so.

Over several weeks, representatives of copyright owners, nonprofit educational institutions and nonprofit libraries, met in lengthy sessions and negotiated many thorny issues. The sessions, at times, were difficult, but everyone was committed to the goal of reaching a fair, sound result. I commend those who participated in those sessions for their resolve and exceptional efforts. The result is a compromise. The package as a whole I believe is balanced. And

I believe it will benefit education in the United States and will not unduly harm copyright owners.

The Copyright Office strongly supports the carefully negotiated compromise reflected in S. 487 as passed by the Senate. Once again, Mr. Chairman, I appreciate this Subcommittee's expeditious hearing. Thank you.

Mr. COBLE. Thank you, Ms. Peters.

[The prepared statement of Ms. Peters follows:]

PREPARED STATEMENT OF MARYBETH PETERS

I am pleased to present the Copyright Office's views on S. 487, the Technology, Education and Copyright Harmonization ("TEACH") Act. First, I would like to express my thanks to Chairman Coble and Mr. Berman, Ranking Member, for holding this hearing. This important legislation extends the current distance education exemption to cover mediated instructional activities transmitted by digital networks; it does this by amending sections 110(2) and 112 of the Copyright Act.

S. 487 is based on the Office's "Report on Copyright and Digital Distance Education." Section 403 of the Digital Millennium Copyright Act directed the Copyright Office to consult with representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives, and to submit to Congress a report on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users. The Office was tasked with considering the following issues: 1) the need for a new exemption; 2) the categories of works to be included in any exemption; 3) the appropriate quantitative limitations on the portions of works that may be used under any exemption; 4) who should be eligible to use any exemption and who should be able to receive the materials delivered under any exemption; 5) the extent to which technological measures should be mandated as a condition of eligibility for any exemption, and; 6) consideration of the availability of licensing.

The Office's inquiry was extensive. It sought public comment, held public hearings in Washington, D.C., Los Angeles, California and Chicago, Illinois, conducted research and consulted with experts in various fields. It also commissioned a study on the licensing of copyrighted material in digital distance education. The report, delivered to Congress on May 25, 1999, contained a description of digital distance education, the licensing of works for such use and the technologies involved. It also included an in-depth analysis of the current law as it applied to distance education and a description of prior initiatives that had addressed the issues, as well as a summary of the views of the interested parties with our analysis and recommendations for legislative change. Some of our most important recommendations were to 1) amend section 110(2) to clarify that the term "transmissions" covered digital as well as analog; 2) expand the coverage of rights in section 110(2) to the those that are technologically necessary to allow the delivery of authorized performances and displays through digital technologies; 3) eliminate the requirement of a physical classroom but limit the exemption to students officially enrolled in a course; 4) emphasize the concept of "mediated instruction" to ensure that the exemption is limited to what is, as much as possible, equivalent to a live classroom setting; 5) keep the exemption limited to nonprofit educational institutions and consider adding the additional requirement of accreditation; 6) expand the categories of works exempted from the performance right but limit the amount that made used in these additional categories to "reasonable and limited portions"; 7) require the use of lawfully made copies; 8) amend section 112 to provide for ephemeral copies; and 9) add a number of new safeguards to counteract the new risks encountered when works are transmitted in digital form. Of course, the fundamental principle of the Office was its belief that emerging markets should be permitted to develop with minimal government intervention. This subcommittee held a hearing on the report once it was released.

The Senate Judiciary Committee held a hearing on S.487 on March 13, 2001. In my testimony in that hearing I noted that the language of the bill raised a few issues. Additionally, educational institutions and copyright owners objected to some of the provisions and had questions about others. None of the identified issues or questions was easy to resolve, and at that point, the parties seemed far apart.

In late April, after the Senate hearing, the Office was asked to facilitate discussions among the interested parties with the goal of reaching consensus and was pleased to do so. Over several weeks, representatives of copyright owners, nonprofit

educational institutions and nonprofit libraries met in lengthy sessions and negotiated many thorny issues. The sessions were at times difficult, but everyone was committed to the goal of reaching a fair, sound result. I commend those who participated in those sessions for their resolve and exceptional efforts. The result is a compromise that is balanced and that will benefit education.

The Copyright Office strongly supports the carefully negotiated compromise reflected in S.487 as passed by the Senate. Once again, Mr. Chairman, I appreciate this subcommittee's expeditious hearing on this bill.

Mr. COBLE. Mr. Adler if you could convey our good wishes to Ms. Schroeder, we would be appreciative. I am sure you see her from time to time, do you not?

Mr. ADLER. Yes, I do, and she instructed me to convey her good wishes to you and Mr. Berman and the Members of the Subcommittee as well.

Mr. COBLE. Prior to your beginning, we were pleased to have been joined by the distinguished lady from Wisconsin and the distinguished gentleman from Arkansas.

Mr. Adler.

STATEMENT OF ALLAN R. ADLER, VICE PRESIDENT, LEGAL & GOVERNMENT AFFAIRS, ASSOCIATION OF AMERICAN PUBLISHERS, INC.

Mr. ADLER. Thank you, Mr. Chairman for inviting me to appear here today on behalf of the Association of American publishers. As you know, among the members of AAP are the Nation's leading educational publishers, who have been strong supporters from the outset of using the Internet as a medium for conducting educational programs. Not only are most of them producers of high quality digital content for online educational use, some of them are themselves providers of digital distance education programs, including programs that are certificate programs, and even associate and baccalaureate degree programs as well.

Proposals to extend the existing instructional broadcasting exemption in the Copyright Act to cover Web-based performance and display of copyright works for remote and asynchronous distance education purposes have raised potentially significant marketplace issues for publishers and other copyright owners. An overbroad, unrestricted exemption could adversely affect or even destroy both the online and off line market for such works.

Chiefly, the concerns came down to two issues: One is that an improperly crafted exemption would permit the online use of entire copyrighted works in a matter that could substitute for the usual purchase or acquisition of instructional materials by or for students.

Our second concern was that exposure of copyrighted works to potentially market killing risks of unauthorized reproduction and distribution on the Internet could occur if appropriate safeguards were not built into the exemption.

The TEACH Act, as passed by the Senate, represents what we would consider a classic "give some, and get some" compromise among the affected communities whose representatives in the negotiation process agreed to support the compromise without change through the entire legislative process. From AAP's perspective, the compromise substantially addresses the publishers main concerns regarding the revised exemption's potential substitution for sales

and exposure of copyrighted works to unauthorized online reproduction and distribution. It does so chiefly through revisions to the original bill as introduced that clarify the scope of the exemption in terms of the materials and activities covered, the safeguards provided for copyright interests, and the conditions of eligibility for the beneficiaries of the exemption.

Time and again, Mr. Chairman, when affected communities have been locked in seemingly insurmountable disagreements over important pending legislation, we have heard you and other congressional leaders urge them to devise mutually acceptable compromises among themselves, or risk the possibility and likelihood that their intransigence will result in having less satisfactory compromises imposed on them by Congress. But with issues concerning the application of copyright in the digital environment, the opportunities for Congress to achieve such win-win situations among contending communities through their own negotiations have proven to be quite rare.

AAP believes the Subcommittee has such a rare opportunity, however, before it today with respect to the issue of amending the section 110(2) exemption in the Copyright Act, to apply to Web-based instructional activities. We extend our plaudits and praise to the members of the education and library community who participated in the negotiations with us. They deserve plaudits for their vigorous advocacy on behalf of their respective community interests. And even more praise, in our view, for their courageous pragmatism in accepting somewhat less than those interests have demanded in order to reach a reasonable agreement on behalf of all the contending interests. We hope that you will heed our urging and suggestion to move the Senate passed version of the TEACH Act through the House process for passage and ultimately to the President's desk without amendment. Thank you very much.

Mr. COBLE. Thank you, Mr. Adler.

[The prepared statement of Mr. Adler follows:]

PREPARED STATEMENT OF ALLAN R. ADLER

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to appear here today on behalf of the Association of American Publishers ("AAP") to discuss S.487, the proposed "Technology, Education And Copyright Harmonization Act of 2001" (or "TEACH Act"), as it was passed by the Senate on June 7 of this year.

As you may know, AAP is the principal national trade association of the U.S. book publishing industry, representing some 300 member companies and organizations that include most of the major commercial book publishers in the United States, as well as many small and non-profit publishers, university presses and scholarly societies.

AAP members publish books and journals in every field of human interest. AAP members include the nation's leading educational publishers, who produce textbooks and other instructional and assessment materials covering the entire range of elementary, secondary, postsecondary and professional educational needs. While continuing to serve market demands for such works in hard copy, paper-based formats, these publishers also operate Internet websites and produce computer programs, databases, multimedia products, and other electronic software for use online and in other digital formats. Many are also increasingly involved in the nascent "e-book" market, where the reader's use and enjoyment of all kinds of literary works may be greatly enhanced through the added functionality that books in digital formats can offer when read on computer screens or through hand-held personal digital appliances.

AAP SUPPORT FOR WEB-BASED EDUCATION, OPPOSITION TO COPYRIGHT EXEMPTION

From the outset, AAP members have generally been strong supporters of using the Internet as a medium for conducting educational programs. Many publishers are producers of high-quality digital content for online educational use and some are themselves providers of digital distance education course programs. However, proposals to extend the existing "instructional broadcasting" exemption in the Copyright Act [17 U.S.C. Section 110(2)] to cover Web-based performance and display of copyrighted works for remote and asynchronous "distance education" purposes have raised potentially significant marketplace issues for publishers and other owners of such copyrighted works. An overbroad, unrestricted exemption could adversely affect, or even destroy, both the online and off-line markets for such works.

To fully appreciate the significance of AAP's support for the Senate-passed TEACH Act, it should be remembered that, for nearly three years prior to endorsing the negotiated compromise embodied in that legislation, AAP had vigorously opposed all earlier legislative proposals to extend the Copyright Act's "instructional broadcasting" exemption to cover Internet-based "distance education" activities.

In April 1998, when this Subcommittee was working on legislation which would eventually be enacted as the Digital Millennium Copyright Act ("DMCA"), AAP opposed an "online distance education" proposal in an alternative bill (H.R.3048) that was also pending before the Subcommittee. AAP opposed the alternative bill's proposal because its version of a revised Section 110(2) exemption would have (1) permitted the online use of entire copyrighted works in a manner that substituted for the usual purchase or acquisition of instructional materials by or for students, and (2) exposed copyrighted works to potentially market-killing risks of unauthorized reproduction and distribution on the Internet. In light of such concerns, AAP opposed amending Section 110(2) as part of the DMCA but supported the eventual DMCA mandate for the Register of Copyrights to conduct a study to produce "recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works."

In July 1999, when this Subcommittee held a hearing to review the Register's recently-issued "Report on Copyright and Digital Distance Education," AAP argued that the Register's proposed amendments to revise the Section 110(2) copyright exemption to embrace the Internet was unjustified, unfair and unworkable in light of the Report's explicit findings regarding the vibrant and burgeoning nature of the digital distance education marketplace; the mixture of competition and cooperation among non-profit and for-profit providers of Internet-based distance education programs; and the uncertainties regarding current availability of effective and affordable technological measures that the Register had deemed an indispensable requirement for maintaining the "balance" between the rights of copyright owners and the needs of users of copyrighted works in the digital network environment.

AAP reiterated its objections to the Register's proposed Copyright Act amendments before the Congressionally-mandated Web-Based Education Commission in July 2000, and again before the Senate Judiciary Committee when a hearing was held on the newly-introduced TEACH Act in March of this year.

The proposed TEACH Act (S.487), which was cosponsored by Senators Hatch and Leahy, represented the first time that the Register's recommendations for amending the Section 110(2) exemption had been introduced as proposed legislation. In its testimony on the proposed TEACH Act as introduced, AAP noted that its continuing opposition to such legislation was based not only on the findings in the Register's Report, but also on its fundamental concerns regarding market substitution for the typical purchase or acquisition of instructional materials and the inherent network risks of exposing copyrighted works to potentially devastating unauthorized online reproduction and distribution.

TOUGH NEGOTIATIONS PRODUCE A SOLID COMPROMISE

But, in opposing the TEACH Act as introduced, AAP nevertheless attempted to be constructive in its testimony before the Senate Judiciary Committee by identifying specific areas of revision which might make the proposed legislation more palatable to the publishing community and other copyright owners. With the witnesses from the education community similarly suggesting changes they wanted to see in a revised bill, Senators Hatch and Leahy initiated an intense but, ultimately, successful negotiation process in which representatives of the content, education and library communities—laboring under the guidance of the Register of Copyrights and her staff—fleshed out the skeletal provisions of the original legislation and produced a workable consensus compromise for amendments to the Copyright Act which will

extend the current "instructional broadcasting" exemption to cover mediated instructional activities transmitted via the Internet and other digital networks.

The TEACH Act, as passed by the Senate, represents a classic "give some, get some" compromise among the affected communities whose representatives in the negotiation process agreed at its conclusion to support the compromise *without change* through the entire legislative process. Although each of the affected communities would undoubtedly prefer to see certain aspects of the bill treated differently from the manner agreed upon in the compromise embodied in the Senate-passed legislation, all agree that the compromise is better than the bill as originally introduced, and will achieve the goal of allowing teachers and students to benefit from the content-enriched instructional use of digital networks like the Internet, while providing appropriate safeguards to limit the additional risks to copyright owners that are inherent in exploiting copyrighted works in a digital format.

From AAP's perspective, the compromise embodied in the Senate-passed TEACH Act substantially addresses the publishers' main concerns regarding the revised exemption's potential substitution for sales and exposure of copyrighted works to unauthorized online reproduction and distribution. It achieves these results through revisions to the original bill that clarify the scope of the exemption (*i.e.*, the materials and activities covered), the safeguards provided for copyright interests, and the conditions of eligibility for the beneficiaries of the exemption. These provisions are explained in a "section-by-section analysis" of the bill which appears in the *Congressional Record* of June 7, 2001 at p.S5992-5994.

SUPPORT HOUSE PASSAGE OF THE TEACH ACT COMPROMISE WITHOUT AMENDMENT

Although substantively sound, the negotiated compromise that is embodied in the Senate-passed TEACH Act is politically fragile. The trade-offs that produced agreement on different parts of the legislation and facilitated the overall compromise cannot be made subject to further changes without threatening to unravel the whole. While some in the affected communities might welcome the disintegration of the consensus compromise and the consequent resumption of dispute over proposed revision of the Section 110(2) amendment, AAP believes that the quest for the perfect should not become the enemy of the good. Too much good work has been done to let this precious opportunity for advancement slip by.

Time and again, when affected communities have been locked in seemingly insurmountable disagreement over important pending legislation, Congressional leaders have urged them to devise mutually-acceptable compromises among themselves or risk the likelihood that their intransigence will result in having less satisfactory compromises imposed on them by Congress. But with issues concerning the application of copyright in the digital environment, opportunities for Congress to achieve such "win-win" situations among contending communities through their own negotiations have proven to be quite rare.

AAP believes that the Subcommittee has such a rare opportunity before it with respect to the issue of amending the Section 110(2) exemption in the Copyright Act to apply to Web-based instructional activities. The representatives of the educational and library communities with whom the content community has worked to achieve the negotiated compromise in the Senate-passed TEACH Act deserve plaudits for their vigorous advocacy on behalf of their respective constituent interests and even more praise for their courageous pragmatism in accepting somewhat less than those interests have demanded in order to reach a reasonable agreement on behalf of *all* of the contending interests. AAP is proud to join with its partners in each of these affected communities to urge this Subcommittee and the full House Judiciary Committee to work with us to secure enactment of the compromise embodied in the Senate-passed TEACH Act *without amendment*. On this matter, we believe that is the best way for Congress to serve the public interest.

Mr. COBLE. When I praised all of you for getting your heads together, I don't think I extended adequate thanks and appreciation as well to Senators Leahy and Hatch. I think they and their staffs did a good job as well of herding everybody simultaneously to the table.

Dr. Vaughn, good to have you with us.

STATEMENT OF JOHN C. VAUGHN, EXECUTIVE VICE PRESIDENT, ASSOCIATION OF AMERICAN UNIVERSITIES

Mr. VAUGHN. Thank you. I very much appreciate the opportunity to testify before this Subcommittee. And I want to thank you for holding this hearing so promptly on a piece of legislation that the education community believes is very important. We strongly support S. 487 because it would go far in the direction of our fundamental goal of achieving parity of educational content between that which can be provided remotely over a computer terminal and that which can be provided through performances and displays in face-to-face classroom teaching.

We think this parity is really essential to achieving the full potential of online distance education. We think this bill does it in ways that would accomplish these educational advancements while protecting the interests of copyright owners. During its deliberation on the Digital Millennium Copyright Act, Congress confronted the question of whether and what kinds of legislative changes would be needed to fulfill the full potential of online distance education. Because it lacked the information necessary to answer the question at that time, it turned to the Copyright Office to conduct a study.

The Register of Copyrights has described that study for you. I just want to add here my commendation to the register for the thorough, open and fair process by which she and her staff conducted that study, and the very thoughtful comprehensive report that they prepared from the study.

As important as the Copyright Office study was to identifying needed legislative changes, many obstacles lay ahead in translating those recommendations into legislation that could be passed into law. As you mentioned, Mr. Coble, Senators Hatch and Leahy introduced the TEACH Act based on those recommendations last March. At a hearing on March 13th, the education and content community witnesses were widely divergent in their views on that bill.

So the views that had shown up with divergence from your Subcommittee in the hearing in 1999 had not significantly changed. We still had a lot of territory we had to cover. What broke the impasse was the negotiations that you have heard about that involved the education, library and content communities. Those negotiations, which were carried out from late April through the end of May, were very difficult. They involved intense debates over critical issues on which the parties had often sharply diverging and strongly held views. But the negotiations were conducted with candor, with good faith and a recognition of the need for compromise.

In the end all parties agreed that we had produced a legislative product that resolved the problems embedded in the initial version of S. 487 in a manner that we could all support. S. 487 would change current law in a number of ways that would significantly enhance online distance education. These included expanding the categories of works, permitting the delivery of content to any location where a student can access a computer terminal, authorizing the permanences and displays to be made asynchronously, permitting the digitizing of analog works when digital versions of a work are not available, or when they were made inaccessible by technological protection measures, clarifying that the transient or tem-

porary copies that are made as part of an automatic process of transmission do not constitute an infringement.

S. 487 also includes a number of important safeguards against the unauthorized and inappropriate use of copyrighted material. These safeguards include requiring performances and displays to be part of mediated instructional activities under the actual supervision of an instructor, including portion limitations on the new categories of works that were included in the legislation, and limiting displays to amounts typical of a live classroom setting.

Safeguards include the receipt of materials limited to enrolled students only, requiring institutions to use technological measures to reasonably prevent the unauthorized retention and redissemination of the work. As Marybeth Peters mentioned, we added the concept of accreditation to the eligibility criterion of nonprofit educational institutions.

The unanimous support of negotiators and their constituent of groups was achieved through a complex and interrelated set of agreements, compromises and trade-offs. We fully understand that other outcomes are possible. Indeed, Congressman Boucher and Issa have introduced a distance education bill that tracks S. 487 very closely but includes several critical differences. Because our agreement as negotiators is contingent upon the intricately balanced package that we were able to put together, we are asking for your support for S. 487 without amendment.

I am pleased to hear, Congressman Coble, that you are sympathetic with that request. We believe that S. 487, as passed unanimously by the Senate, will help develop the full potential of online distance education while effectively protecting the interests of copyright owners. We agree with Mr. Berman that this bill will go very far in the direction of expanding educational opportunity, leveling the playing field for all students of all ages. It can be an enormous advantage to this society. And we hope that you will concur and support this educational achievement as well.

Thank you again for the opportunity to present the views of the educational community.

Mr. COBLE. Thank you, Dr. Vaughn.

[The prepared statement of Mr. Vaughn follows:]

PREPARED STATEMENT OF JOHN C. VAUGHN

Mr. Chairman and members of the Subcommittee, I am John Vaughn, Executive Vice President of the Association of American Universities. I am pleased to have this opportunity to testify on behalf of the undersigned organizations on S. 487, the Technology, Education, and Copyright Harmonization (TEACH) Act of 2001. This bill is the product of a long series of studies, reports, deliberations and comprehensive negotiations by Congress, the Copyright Office, and the stakeholders in distance education including the education, library, and content communities. S. 487 would significantly increase the capacity of digital distance education to expand teaching and learning in time, place, and richness of content, and would do so in ways that protect the interests of copyright owners.

S. 487 achieves an effective balance between expanded online educational use of copyrighted materials and appropriate safeguards against their misuse. The bill has the support of the education, library and content communities, and we believe it deserves the strong support of this subcommittee. We hope that you will move the bill through the legislative process to passage without amendment by the House, to be signed into law by the President. I would like to explain why we believe such treatment is warranted.

Distance education is not new. It has been with us for more than a century, in the form of correspondence courses, instructional radio broadcasts, and more re-

cently as instructional television. What has changed dramatically in the last few years is the rapid development of digital technology, computer networks, the global Internet, and their application to education. From computers in the classroom augmenting traditional educational materials, to the heretofore impossible online delivery of life-long learning to adults to enhance their career skills and expand their knowledge and understanding more generally, computer networks are revolutionizing the opportunities for both formal and informal education and training.

Distance education has grown in the past few years using material from the public domain and, where available, licensed material. However, that growth has been, and will continue to be, hampered by the disparity in the Copyright Act between the clear exemption available for performances and displays of works in face-to-face classroom teaching, and the limitations on the exemption now available for transmitted performances and displays. It is this disparity that S. 487 is intended to address. It is the elimination of this disparity that is essential to the full realization of the enormous potential of online distance education.

The question that S. 487 answers was first put to Congress during its deliberations on the Digital Millennium Copyright Act (DMCA): does the development of online distance education require changes to the "distance education" exemption as it currently exists in Section 110(2) of the Copyright Act? Congress could not answer the question with the information available to it at the time. Accordingly, it asked the Copyright Office to conduct a study of distance education and submit a report to Congress with "recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works." As this excerpt from the charge to the Copyright Office makes clear, Congress recognized the importance of developing the full potential of digital distance education to capitalize on the expanded educational benefits to society that would result. Congress also made clear the need to maintain a balance between the rights of owners and the needs of users of copyrighted works.

The Register of Copyrights has described to you the study that her office undertook. I will simply add my commendation to the Register for the thorough, open, and fair process by which she and her staff conducted the study, and the comprehensive, thoughtful report they prepared from that study. Included among the recommendations of the Copyright Office report were recommendations for changes to copyright law that would allow educators to use digital technologies to achieve the goals of the distance education exemption enacted in 1976. The cogent analyses of the Copyright Office report made possible and formed the basis for the legislation we are considering today.

As important as the Copyright Office report was in identifying needed legislative changes, many obstacles lay ahead in translating the report's recommendations into legislation that could be passed into law. On March 7, Senators Hatch and Leahy introduced the TEACH Act as an initial transcription of the Copyright Office recommendations into legislation. As indicated at a March 13 hearing on the TEACH Act, the views of the affected parties were widely divergent: the education community testified in support of the bill, but also argued for a number of changes that we believed were important to achieve the critical goal of parity between the content of online distance education and the traditional, residential classroom; the publishers testified against the bill, arguing that no legislative changes to current law were warranted, and adding that if Congress were to conclude that legislation was needed, the TEACH Act should be changed a number of ways that generally moved in the opposite direction of the changes proposed by education groups.

To break this impasse, the Senate Judiciary Committee asked the Copyright Office to moderate a process of negotiations between the education and content communities. The groups involved in the negotiations expanded over time to include additional education groups and library representatives on the education side, and additional content groups on the content side. Both groups maintained contact with broader constituencies throughout the negotiations. The negotiations were carried out with occasional breaks for more than a month, from late April through the end of May.

The negotiations were difficult, involving intense debates over critical issues on which the parties had often sharply diverging and strongly held views. But the negotiations were conducted with candor, good faith, and a recognition of the need for compromise. In the end, I believe that all parties agreed that we had produced a legislative product that resolves the problems embedded in the initial version of S. 487 and provides a means of bringing online educational content into closer accord with that which can be provided in a traditional classroom, and does so in a manner that protects against the misuse of digital copyrighted material.

The negotiated product includes a complex set of agreements on interrelated provisions of Sections 110(2) and 112 of the Copyright Act. Further, during the negotiations, it became clear that it was important not to affect other provisions of the Copyright Act, either explicitly or implicitly.

S. 487 would change current law in a number of ways that would significantly enhance online distance education, including:

- expanding the categories of works that can be used in distance education performances, from nondramatic literary and musical works to reasonable and limited portions of any other works,
- removing the concept of the physical classroom, thereby permitting digital educational content to be delivered to any location where the student can access a computer terminal,
- permitting the storage of copyrighted material on servers in order to permit authorized performances and displays to be made asynchronously,
- permitting the digitizing of works from the wealth of analog material for distance education when a digital version of a work is not available to the institution or the digital work is subject to technological protection measures that prevent its use,
- clarifying that participants in authorized digital distance education are not liable for infringement for any transient or temporary reproductions that occur through the automatic technical process of digital transmission.

S. 487 also includes a number of important safeguards against the unauthorized and inappropriate use of copyrighted material. These safeguards include:

- requiring performances and displays to be part of mediated class instruction under the actual supervision of an instructor,
- portion limitations, including limiting performances of works other than nondramatic literary or musical works to reasonable and limited portions, and limiting displays to amounts typically displayed in a live classroom setting,
- limiting the receipt of materials to enrolled students to the extent technologically feasible,
- requiring institutions to apply technological protection measures that reasonably prevent the retention of the work in accessible form for longer than the class session and the unauthorized further dissemination of the work,
- requiring that performances and displays are given by means of copies or phonocopies that are lawfully made and acquired,
- adding the criterion of accreditation (read as state licensure or certification for K-12 educational institutions) to the criterion of nonprofit educational institutions contained in current law.

Taken together, the legislative changes to current law contained in S. 487 will move online distance education substantially toward the goal of parity of content with that available within a traditional, residential classroom—an essential condition for realizing the extraordinary potential of online distance education; and they will do so without creating significant new risks for copyright owners.

As difficult as this product was to achieve through the negotiation process, the result was one that all parties to the negotiations agreed to support throughout the remaining legislative process. The negotiators recognized that the complex set of agreements has produced a product that is sound and fair in substance, but that it is also a product that cannot brook changes without jeopardizing the carefully crafted compromises and commitments that made this legislation possible.

Therefore, we respectfully request that this subcommittee and the full Judiciary Committee mark up S. 487 without amendment and send the bill to the House of Representatives for passage without change. We are fully aware of the presumption of asking you to accept this product without change, and surely reasonable changes could be proposed. We recognize and appreciate the bill introduced by Congressman Boucher, a long-time supporter of distance education, and Congressman Issa, who has a strong background in the information technology industry that has helped make the power of online distance education possible.

Nonetheless, we believe that the process that has produced S. 487—beginning with the Congressional recognition of the twin challenges of promoting digital distance education while preserving the interests of copyright owners, the decision by Congress to call on the Copyright Office to address these difficult issues, the thorough study and report produced by the Copyright Office, the translation of the Office recommendations into prototype legislation by Senators Hatch and Leahy, and the good faith but arduous negotiations conducted by the key affected parties—this

sequence of events has been an effective public policy-making process that has drawn on Congress, the Executive Branch, and external stakeholders to produce a sound, carefully crafted product that should now be carried to the final step of being enacted into law.

We appreciate the attention given by this subcommittee to distance education, and we look forward to working with you to strengthen the nation's educational capacity through the development of online distance education.

Mr. COBLE. I thank each of the panelists for a very obvious favorable contribution. We have been joined by the gentlelady from California. We will begin the questioning. You know oftentimes in the Judiciary hearings, we sometimes engage in dialogue that resembles an atmosphere of a Washington or Capitol Hill barroom. But I think today's hearing has been more like a lovefest. As you pointed out, Dr. Vaughn, the Register of Copyrights and her very able staff, they do indeed perform good work.

Ms. Peters, if you will explain to us what is intended by "mediated instructional activities," and give us an example or two of these activities that would be permissible under S. 487.

Ms. PETERS. "Mediated instructional activities" was the phrase that was chosen to basically take the place of the classroom setting where the teacher is there and the students are there; it is intended to convey activity where there is a teacher or an instructor at the center and students that may be other places. There is a definition of mediated instructional activity in the bill.

But key to that is that whatever work is being performed or displayed, it is under the direction or under the actual supervision of an instructor, and it is an integral part of the class session. It is really part of the curriculum; it is part of the regular systematic mediated instructional activities of an accredited nonprofit educational intuition. So it is an attempt to try to keep section 110(2) limited to what was the equivalent of a classroom session but recognizing that you can't make that totally equal when you are in an online, asynchronous situation. Does that help?

Mr. COBLE. That is fine. Thank you.

Mr. Adler, the TEACH Act expands the scope of the distance learning exception to apply to performances and displays of all categories of copyrighted works, except for works produced or marketed primarily for performance or display as part of mediated instructional activities, transmitted via digital network. Explain why these works were excluded from the exception.

Mr. ADLER. Again, Mr. Chairman, one of the chief concerns that the publishing community, and indeed, the other communities of copyright interests have had about this type of legislation is that by allowing these works to be made available online, you engage the digital technologies' wondrous capabilities of reproduction and redistribution of those works in absolutely flawless copies.

And so the concern was that we didn't want to see an exemption of this kind substitute for the usual practice by which students acquire and use instructional materials. On the elementary and secondary school levels, typically instructional materials, textbooks and the like are acquired by the educational systems themselves, whether it is the State or local school agencies, and made available for use by the students who retain them while they are being used, but then typically return them back to the educational systems.

On the higher education level, students purchase their own materials for use in their courses, and then ultimately keep them not only during the course but also afterwards because they are the owners of those materials. There is, and has been for quite a long time, a thriving market for the commercial provision of instructional materials by, as I said, the Nation's leading educational publishers.

So we wanted to make sure that this exemption wasn't going to directly confront and ultimately eliminate that marketplace. And so we worked very carefully to find a way of carving out, right at the outset, from the scope of the exemption, those types of materials that lie at the core of this commercial business.

Mr. COBLE. Thank you, sir.

Dr. Vaughn, in your written testimony you referred to the requirement in S. 487 that institutions are to apply technological protection measures that reasonably prevent the retention of the work in accessible form for longer than the class session and the unauthorized further dissemination of the work. Elaborate, if you will, on what measures educational institutions are taking to satisfy this requirement.

Mr. VAUGHN. In the negotiations, we discussed this at some length and virtually——.

Mr. COBLE. Is your mike on?

Mr. VAUGHN. Virtually, all of our institutions now are controlling access to distance education up front by limiting enrollment with password protection measures. Our institutions have a ways to go in terms of implementing technological protections concerning downstream redistribution. This is a new provision. We have not been able to do this. We have been working primarily with public domain licensed materials. But there are technologies available now and we anticipate using streaming technologies, digital rights management technologies.

There were some identified in the Senate report that we think that we all agree as negotiators would be effective in achieving this objective. What we also made clear is that the technical measures employed never could guarantee unauthorized retention or distribution. And the standard was one that would be an objective commonly accepted, standard at the time, institutions anticipate working with technologists, with publishers to identify and deploy these technologies. But I think what really is going to make this package work is the collection of safeguards ranging from controlling material up front, to portion limitations, to technological measures at the end. We all agree there are technologies in place now that will achieve this, and we think there are a number of additional ones on the way.

Mr. COBLE. Thank you, sir. My time has expired. I have some more questions, but I will get to them later. We are pleased to have been joined by the distinguished gentleman from Virginia. I now recognize the gentleman from California.

Mr. BERMAN. Thank you, Mr. Chairman.

Ms. Peters, the Copyright Office report recommended that 110(2) be amended to clarify that the term "transmissions" covers digital as well as analog. The Senate bill doesn't appear to explicitly clarify that transmissions covered digital as well as analog. Does it im-

plicitly, or in some other way, implement the Copyright Office recommendation? Are there other changes in the Copyright Office that you recommended that were not included in the bill?

Ms. PETERS. Actually, I thought that it did make that clear. What it makes clear is that the performance or the display of a work, to the extent that you need to make copies and distribute those copies, which invoke the reproduction right and the distribution right, is covered; these expanded rights are and that is only there for digital. So it doesn't use the word including digital, it uses the additional types of activities that are required in order to make digital transmissions fall within the exemption.

Mr. BERMAN. You mean, you exempt--you exempt the assertion of certain rights, which only apply in the digital world and therefore it must follow.

Ms. PETERS. We were trying not to say digital. Because then every time you mention a work, you have to say analog and digital. And if digital isn't there, then there is the implication that digital isn't covered. So we decided to deal with it through a rights perspective.

Mr. BERMAN. Dr. Vaughn mentioned this whole question of leveling the playing field and the digital divide. Let me ask you, Mr. Adler, the only—in a sense, the mediated instruction and the exemption are for nonprofit educational institutions. There are a lot of proprietary educational institutions, vocational or more general that might want to take advantage of distance learning. What is the basis and what is the need to exclude them? Why is a nonprofit educational institution of a character so different from a proprietary one that one should get it and the other should not?

Mr. ADLER. Mr. Berman, the primary difference, as I mentioned, relates to one of the two chief concerns we had about this exemption, providing essentially a market substitute for the purchase and acquisition of instructional materials. Consider that proprietary educational institutions, or for-profits, they are both our customers, and they are also competitors as vendors of services. And if you look at the Copyright Act generally——.

Mr. BERMAN. What do you mean, "competitors as vendors of services"?

Mr. ADLER. There are publishers who are now also providers of distance education programs; for example, the Harcourt Company, which is a major publisher of elementary and secondary and higher education textbooks.

Mr. BERMAN. Doesn't the University of California have a publishing——.

Mr. ADLER. It has a university press, which is also a member of AAP, too. The university presses were concerned about this issue as well. The feeling generally was, that at least for now, the Register's report had not examined all of the implications of allowing for-profit institutions to benefit from the exemption. The publishing community, knowing that these for-profit institutions are not only part of our customer base, but also compete with us to the extent that they produce their own course materials, or provide distance education programs, believed that it would be inappropriate for Congress to create a significant competitive advantage for them by an exemption in the Act.

Mr. BERMAN. Is the bill on this issue consistent with the Copyright's officer's recommendation?

Ms. PETERS. Absolutely. We feel very strongly that it should be limited to nonprofit activities. If you look at the history of the copyright law, it makes a huge distinction between for-profit and nonprofit. If you look at who we were asked to consult with, we were only asked to consult with nonprofit educational institutions. So we believe that nonprofit is, in fact, the appropriate dividing line.

Mr. BERMAN. Okay. I have a couple more questions, and if there is a second round, I will use them then, Mr. Chairman.

Mr. COBLE. We may go to a second round.

To the gentlelady from Wisconsin.

Ms. BALDWIN. I, actually, was going to pursue the line of questioning that Mr. Berman just did in the difference between the for-profit and not-for-profit dealing. But I am happy to yield my time for questioning to the Chair or the Ranking Member. I don't have any further inquiries at this time.

Mr. COBLE. I thank the lady.

The gentlelady from California.

Ms. LOFGREN. Thank you, Mr. Chairman. I think there is always a danger when you get to the House side with the Senate product that we will want to meddle and redo it, and I don't think that is the motivation of any Member of this Committee, but obviously we have questions. We didn't go through the process that you went through on the Senate side. So don't make more of these questions than is intended.

I do, however, want to clarify on page 4, "does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention of or unauthorized further dissemination." it seems to me that that definition is subject to—or maybe it is not, maybe it is intended to—to a very broad reading.

All of us and I don't want to get into the specific issue because I think there has been some miscommunication or misleading press coverage, but recently we all read in the paper about a professor who attempted to deliver a paper about decryption at a scientific seminar, and now there is a legal dispute about whether or not he could, in fact, do that under the Digital Millennium Copyright Act. I think this section raises that same issue.

If an institution, let's say it is Stanford University, and they are engaged in all kinds of research as an institution and decryption and other scientific endeavors that could be utilized by someone to defeat technological measures. Does that mean that Stanford would be in violation of this section? Who wants to answer that?

Mr. ADLER. Ms. Lofgren, to some extent, we were caught in a difficult position between trying to address competing concerns. One is the kind of concern that you have just raised. The other was the concern that, as introduced, the standard was simply that they do not interfere with technological measures in an unqualified manner. And it was felt that that would impose a kind of strict liability obligation on the educational institutions which would be even more troublesome to them.

So the concept here was to impose an objectively reasonable standard that would allow them to examine what kinds of activi-

ties, or what kinds of things that they might engage in, might violate this. But to do so in what would be considered a reasonable man's test, an objective standard that would allow them to look at these activities in terms of the reasonable expectations and consequences of particular actions. Otherwise, if we left the language as it was in the bill as introduced, then arguably, anything that could have interfered with technological measures, regardless of whether or not it resulted from specific action taken by the institution, could have been their——.

Ms. LOFGREN. I am not arguing that this is or is not an improvement over the original language. My question is, could this section be used to enjoin a scientist from delivering a paper about decryption?

Mr. ADLER. I would suppose an extremely broad reading of it could. Obviously, because the issue is now before a Federal judge, we are going to find the answer to the questions as to how the provisions of the Digital Millennium Copyright Act——.

Ms. LOFGREN. We are dealing with the new Act here.

Mr. VAUGHN. Congresswoman Lofgren, I think my reading of this is that this would not, in any way, interfere with the scientist delivering information at a conference, which would be deeply troubling. Because this refers to a carefully circumscribed set of activities and mediated instructional activities and performances and displays. And I think that the activities you have described would fall outside the scope of this kind of performance or display for any instructional education.

Ms. LOFGREN. If I can follow up, am I correct in assuming that the intent of this was directed at the actual conduct relative to the transmission rather than the broader activity engaged in, say, by a university?

Mr. VAUGHN. Absolutely. This is another—essentially this bill says that institutions have an obligation to apply technological measures to reasonably prevent downstream redistribution of material they use in performance and displays. And this provision here is saying they also cannot interfere with TPMs that——.

Ms. LOFGREN. If I may, I think, although this is a hearing that needs to be clarified in the Act itself. I don't want to do that right here. I can, you know, understand, and I don't disagree with the intent, but I this think broad language—I am not going to support something that ends up with professors precluded from delivering scientific papers. I am just not going to do that. So we need to clarify this, I think.

Mr. ADLER. That is clearly not the intent.

Ms. LOFGREN. The other question I have. I am out of time. I am sorry Mr. Chairman.

Mr. COBLE. It appears that the scheduling gods are in our corner this morning. I think we can go ahead with a second round and probably beat that floor vote.

Ms. Peters, does S. 487 implicate the United States international treaty obligations in any way or, in other words, are we going to find ourselves crossing swords with some of our trading partners?

Ms. PETERS. I believe that the issue would be whether or not the amendment, which is an exemption, is a permitted exemption under the TRIPS Agreement, which basically allows exemptions in

certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the copyright holder.

I strongly believe that the way that this bill is crafted and the compromise that has been struck is one that is narrow in scope and reach, and therefore, the way that you have limited what can be used, and the technological protection measures that are included, would make it an acceptable exemption under the TRIPS agreement. So the answer is no, it will not violate any treaty obligations.

Mr. COBLE. I may impeach you with that answer if we have trouble down the road.

Ms. PETERS. That is okay. We will have to defend it.

Mr. COBLE. Mr. Adler, how would the exemption apply to textbooks? In other words, how would an instructor use information from a textbook in a distance education course, A, and B, would S. 487 permit an entire textbook, for example, to be placed online for distance education students' access?

Mr. ADLER. There would be the possibility to use small portions of a textbook in the same way that they would be utilized, for example, under a fair use approach. The definition of mediated structural activities makes it clear, however, that materials of the kind that are used in one or more class sessions of a single course like textbooks, course packs and such are not intended to be covered by the exemption.

Mr. COBLE. Dr. Vaughn, did you want to add something to that?

Mr. VAUGHN. I just wanted to add that Allan is absolutely right. We were very clear that we did not want to allow substitution of this Act, to substitute for the purchase of textbooks. But the Senate report also made clear that portions of a textbook could be used in performance and display if it was other than the textbook that would be used and purchased by students, say, a different textbook in a classroom. A professor might use a table from a textbook as a performance or display, and that would be under the distance education exemption, not just a fair use exemption. And that would be allowed here as well. What we didn't want to have happen would be for this Act to allow students who would be purchasing a textbook to get access to that textbook through this mechanism.

Mr. COBLE. Very well.

Dr. Vaughn let me ask you this: As you know, asynchronous education is when a student accesses course material when it is convenient for them, not necessarily at a specific hour designated by the body or institution. How does S. 487 facilitate asynchronous education while still protecting against copyright infringement?

Mr. VAUGHN. The critical change that was made here is in section 112 to allow institutions to load content on to a server to make it available, as you indicate, for students at any time. But we have—the technological protections that we are required to employ to prevent students from retaining that for longer than authorized, longer than a normal classroom session under mediated instruction, or from downstream redistribution of this, those technical measures such as streaming technologies or digital rights management, would allow us to leave material on a server for the duration of a course, but prevent students from misusing that material

while still enjoying this tremendous advantage of accessing it at any time of the day or night that works for them.

Mr. COBLE. Well, I guess what bothers me is how you are going to clearly monitor that.

Mr. VAUGHN. We are required, first of all, that all these activities have to be under as the Register explained, mediated instructional activities. So this has to be a planned course.

Mr. COBLE. Okay.

Mr. VAUGHN. It has to be under the actual supervision of an instructor. That doesn't mean that the instructor must be there at midnight when the student is accessing the content, but that the activities have been under the supervision sanctioned by an instructor, and an instructor is involved in the ongoing student use of the material.

Mr. COBLE. Very well. The gentleman from California. I say to the gentlelady from California, have you other questions too, don't you? What we will do, let's let Mr. Berman pursue his questions for 5 minutes, then we will go vote, and we will come back for the final round.

Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman. Students I know have been able to get asynchronous education for a very long time: You copy the notes from the kid who went to class, you buy the outline.

Mr. VAUGHN. Not in a California institution.

Mr. BERMAN. I want to pursue that same area Ms. Lofgren did perhaps from a somewhat different angle, although not again in the context of trying to mess up this deal, but just—and so I ask you, Dr. Vaughn, by that section that she referred to, Ms. Lofgren referred to, the university community acknowledges it is appropriate for the government to require the use of copy and access protection measures by entities that wish to make socially beneficial uses of copyright materials. And you acknowledged that you think the institution has a responsibility here to protect that which they transmit.

Mr. COBLE. Howard, he says he can't hear you. Can you pull your mike a little closer to you?

Mr. BERMAN. Did you hear me up until now?

Mr. VAUGHN. Yes.

Mr. BERMAN. Is this the only instance in which the AAU would consider such a government mandate of technical protection measures to be appropriate? Would it support a similar mandate in other circumstances? Could the AAU reconcile its position on this with some of its views about the DMCA and the desire to exempt itself and the research community from the prohibitions on the circumvention of technical protections?

Mr. VAUGHN. The short answer and impertinent answer is no.

Mr. BERMAN. No what?

Mr. VAUGHN. We wouldn't go beyond this to say that it resolves our concerns on DMCA. What I think——.

Mr. BERMAN. You have an obligation when you are transmitting it, but you don't have an obligation when you are trying to get it?

Mr. VAUGHN. No. The key thing I think here, Congressman, is an issue of balance. We recognize to make this distance education exemption work, we have to have reasonable assurances against

the misuse of that exemption. And we think the provisions that have been negotiated are acceptable. I think our view in the 1201 rulemaking to which you allude is not a fundamental opposition to the application of technological protections to protect material, but we think the balance came out wrong in that way. We are concerned that the effect will be a diminution in exempt purposes, and we would like to rebalance it.

Mr. BERMAN. You mean the fair use purposes?

Mr. VAUGHN. Absolutely. It is not a disagreement in principle, but a disagreement in balance. We think we have the balance right here, but we don't think we did in 1201.

Mr. BERMAN. Of course, those of us who have taken a somewhat different view are worried that in your desire to focus only on those who commit the transgressions and to provide an exemption from the 1201 prohibitions in the fair use area, that that exception swallows up the entire prohibition, and essentially renders the DMCA meaningless.

Mr. VAUGHN. And I don't think we were ever pressing for that when we testified before the Register in the rulemaking process. We didn't ask for a complete elimination of 1201. We understand the importance of that. Again, I think it is a matter of the balancing of the provisions.

Congresswoman Lofgren pointed out the provision here which allows—which prevents us from interfering with technological protections applied by copyright owners. These are extraordinarily complicated issues all across the DMCA. And I think—I hope that we will continue to see if we have gotten the balance right. We think we got it right here. We don't think we got it right in 1201.

But by no means do we mean to say in 1201 that content owners don't have a right to use technological protections. We agree with that. But when we think that those technological protections have the effect—intended or unintended—of sharply diminishing exemptions that Congress has ruled ought to be made, that is where we are concerned. We think this one works and the 1201, we don't quite have it yet.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. COBLE. We will stand in recess while we go vote. And Ms. Lofgren will revisit her questioning. And while we are away, why don't you all think about the possibility if perhaps the question that she raised if it can be resolved through report language. I am not suggesting that it can be, but it might be. You all kick that around while we are away. We will stand in recess until we return.

[Recess.]

Mr. COBLE. We are back in session. Howard, I believe you had maybe a minute or two to go. Do you have other questions? The gentleman has concluded. The gentlelady from California is recognized.

Ms. LOFGREN. Thank you, Mr. Chairman. I had another question on page 4. The retention of work in accessible form by recipients of the transmission. I mean, I have got two sets of questions. When I was in school quite a long time ago, you would get fair use fragments of things to study. For example you might get lines from three poems, by three poets, Randall Jarrell, Gary Snyder, and Ginsberg. And you are going to compare the first line of different

poems. That would probably be subject to fair use. Students might look at it. But students might also keep it for a couple of reasons, one, because they loved the lines, two, because they needed to study it for their final, or they wanted to share it with mom and dad. And that would also be covered by fair use. As I understand this section, the ability for the recipient to utilize that material in a traditional fair use way is now going to be eliminated; is that correct?

Mr. VAUGHN. Well, let me just start by saying I think all of the provisions governing fair use are unaffected by this at all. Those provisions—the use of material in mediated instructional activities or elsewhere under fair use will not be affected at all.

In terms of using material under an explicit distance education exemption in performance and displays, this language about inaccessible form I think is intended to refer to the fact that there may be material that is available, for longer than the classroom session, but it is no longer accessible. It may be on somebody's hard drive, but it is not accessible, so it meets the obligation to not allow material, performances and displays, distance education, not fair use, to be accessible for longer than is authorized under this mediated instructional concept.

Ms. LOFGREN. I am not sure I am following that. Let's say I am a student, I am taking a course. I access it at midnight. I find on the course Web site information that I can access because I have my password and it has got the lines from the three poems. If it is streaming, I may or may not be able to actually save it. But let's say I have it and I print it, I can get it and print it. Doesn't this preclude me from saving what I printed?

It doesn't. Explain why it doesn't.

Mr. ADLER. Ms. Lofgren, the provision you are asking about, like the provision you asked about earlier, these are not general rules of copyright that prescribe conduct for all persons. These are simply conditions of eligibility for claiming this exemption. The only effect, for example, of the provision you mentioned earlier is that if in the course of engaging in a performance or display as part of a digital transmission under this exemption, someone were to engage in conduct that could reasonably be expected to interfere with technological measures, the only consequence of that is they can't claim the exemption. There is no civil or criminal——.

Ms. LOFGREN. So the fair use issues.

Mr. ADLER. The fair use issue is the same way. This provision only addresses the issue within the context of this specific exemption for these types of displays. Fair use is unaffected by this legislation.

Ms. LOFGREN. So we are back to the problems posed by the Digital Millennium Copyright Act.

Mr. ADLER. To the extent that there are issues that you have raised, they are under the DMCA provision, not under this.

Ms. LOFGREN. So the free speech and fair use issues are going to have to be dealt with in that context?

Mr. VAUGHN. Those issues are still out there.

Ms. LOFGREN. I have a final question.

Mr. COBLE. Would the gentlelady yield just a minute. Dr. Vaughn, I didn't hear what your last comment was.

Mr. VAUGHN. I was agreeing with the Congressman that those issues are still out there.

Mr. BERMAN. To the extent they are issues.

Mr. VAUGHN. Right.

Ms. LOFGREN. They are always issues but whether they are problematic issues to every Member is the secondary question.

Mr. BERMAN. Real issues to every Member.

Ms. LOFGREN. At the end of the bill there is a study that, I guess, I am a little skeptical of, a report. Number one, it is unclear to me that a governmental agency is necessarily the right person or entity to do this report. Number 2, if we are going to have a governmental entity to do this report, that the Register of Copyright or the Under Secretary of Commerce is necessarily the right place to do such a study. It seems to me this is a technology issue, not a copyright or IP issue. I am wondering why this selection as opposed to, for example, NIST or National Academy of Sciences or something that is really entrenched in more of the scientific technological world. Maybe Marybeth should be the person to answer that question.

Ms. PETERS. Not really. Actually this was part of the negotiated agreement. And it doesn't really relate to the Copyright Office. Frankly, had I been asked, I would have said if it was any government agency, it should be ours. But I was not part of that.

Mr. ADLER. This was actually part of the legislation that I don't think was a matter of contention between the content industries and the user communities that were involved in the negotiations. It was, however, intended, as I understand it, to be merely informational for all of those communities, to give them some idea of the availability of technology with respect to the technologies required and the uses of technologies under the bill. It had been the source of contention in earlier versions because the high tech community felt that at that time, if the study was going to engage in comparative assessments or evaluations of different proprietary technologies, then it would put a government agency in the position of essentially endorsing winners or losers among——.

Ms. LOFGREN. I can see that has been dealt with because of the nature of the report. So it sounds to me that there wouldn't be an objection for the Subcommittee to at least inquire of the Commerce Department, National Academy of Sciences, NIST, and others about who might be best—most capable of providing technical information without changing the nature of what they are going to report.

Mr. ADLER. Only to the extent that that would require the type of statutory amendment that could hold up this legislation.

Ms. LOFGREN. I see. My time is up but I am out of questions, Mr. Chairman.

Mr. COBLE. Well, again we want to express our thanks to the panelists for a very worthwhile hearing, I think. I appreciate the Members contribution as well. This concludes the legislative hearing on S. 487, the Technology Education Compromise Harmonization Act of 2001. The record will remain open for 1 week. Thank you again. And the Committee stands adjourned.

[Whereupon, at 11:28 a.m., the Subcommittee was adjourned.]